

<b>Tzivin v Boymelgreen</b>
2022 NY Slip Op 31642(U)
May 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 504693/2019
Judge: Ingrid Joseph
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

At an I.A.S Term, Part 83 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th the day of May 2022.

P R E S E N T: HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
NATHAN TZIVIN,

Plaintiff,

Index no.: 504693/2019

-against-

JESHAYAHU BOYMELGREEN,

Defendant.

-----X

**Recitations, as required by CPLR § 2219(a), of the papers considered in the review of plaintiff's motion(s):**

The following e-filed papers read herein:

NYSCEF Doc. No.s:

Notice of Motion/Affirmation in Support .....	26 - 29
Opposition .....	31

In this matter, plaintiff, Nathan Tzivin (“plaintiff”), moves (Motion Seq. 4) for an extension of time to effectuate service of process upon defendant, Jeshayahu Boymelgreen, (“defendant”), pursuant to CPLR § 2004, or, alternatively, for leave to effectuate service upon defendant by serving a copy of the summons and complaint upon his attorney of record.

Plaintiff commenced this matter by the filing of a notice of motion for summary judgment in lieu of complaint on March 4, 2019. In the motion, plaintiff states, through his attorney, that the County Court of Tel Aviv-Yafo, Israel awarded a money judgment in his favor and against the defendant in the amount of \$335,025.00. Plaintiff ultimately seeks recognition of the money judgment and an order converting the judgment to a New York judgment.

The defendant responded to the motion in a pre-answer cross motion to dismiss on jurisdictional grounds. Plaintiff filed another motion seeking an extension of time to serve. The matter, having been reassigned to this court, was administratively adjourned multiple times during the COVID-19 pandemic. Upon oral argument, this court issued a decision and order on October 27, 2021 (“2021 order”) that address the parties’ respective motions. The court denied the motion for summary judgment in lieu of complaint without prejudice and the defendant’s cross motion to dismiss but granted plaintiff’s motion for an extension of time to effect service upon the defendant. In the 2021 order, the court directed that plaintiff effectuate service upon defendant personally, within 30 days of the order with notice of entry.

Plaintiff e-filed a copy of the order with notice of entry on November 15, 2021. However, plaintiff never filed the affidavit of service to establish that he effectuated service by December 15, 2021, in accordance with the 2021 order. Instead, plaintiff filed the instant motion, on December 13, 2021, wherein he requests additional time to serve the defendant.

In support of the motion, plaintiff explains that the defendant, who is domiciled in Florida, has purposely evaded in-hand delivery of the initiatory papers, by refusing to answer the door for the process server on multiple occasions. Plaintiff annexed the sworn affidavit of Hugo Mata of Caplan, Caplan & Captain Process Server, to support this assertion. According to Mr. Mata, he attempted to serve the Notice of Electronic Filing, Summons, Notice of Motion for Summary Judgment in Lieu of Complaint, the Affirmation and Affidavit in Support, and Exhibits upon the defendant on November 18, 2021 (3:25 p.m.), November 19, 2021 (4:15 p.m.), November 22, 2021 (5:00 p.m. and 6: p.m.), November 29, 2021 (6:14 p.m.), December 1, 2021 (9:38 a.m. and 2:50 p.m.), and December 6, 2021 (4:06 p.m.). Mr. Mata avers that he affixed the documents to the door of the defendant's residence, located at 4539 Pine Tree Drive, Miami Beach, FL 33140 and subsequently, on December 8, 2021, he sent a copy of the documents to the defendant via United States Postal Service, First Class Mail.

Plaintiff now asks for an extension of time to serve, or, alternatively, leave to serve process on the defendant through his counsel, Brian Itzkowitz. The defendant submitted written opposition to the motion through his attorney, Levi Huebner, Esq. of Levi Huebner & Associates, PC. Mr. Huebner asserts that his appearance herein is solely for purposes of contesting jurisdiction. He also contends that the court should not allow service on the defendant to be effectuated by serving Brian Itzkowitz, because the defendant has failed to establish through proof in admissible form that Mr. Itzkowitz is plaintiff's in-house counsel. Mr. Huebner also contends that Mr. Mata's affidavit of

service is improper, since it is not accompanied by a certificate of conformity in accordance with CPLR § 2309.

The court notes that personal service may be effectuated by personal delivery of the summons (CPLR § 308 [1] ), or by delivery “to a person of suitable age and discretion at the actual place of business, dwelling place or usual place of abode” (CPLR § 308[2] ). Service pursuant to CPLR § 308(4), commonly known as “nail and mail” service, may be used only where service under CPLR § 308[1] or 308[2] cannot be made with “due diligence” (see *Feinstein v. Bergner*, 48 NY2d 234, 239 [1979 ]; *O’Connell v. Post*, 27 AD3d 630 [2d Dept 2006]; *Simonovskaya v. Olivo*, 304 AD2d 553 [2d Dept 2003]; *Rossetti v. DeLaGarza*, 117 AD2d 793 [2d Dept 1986]). Nail and mail service is effected “by affixing the summons to the door of either the actual place of business, dwelling place or usual place of abode within the state of the person to be served and by either mailing the summons to such person at his or her last known residence or by mailing the summons by first class mail to the person ... at his or her actual place of business,” (CPLR 308[4]).

The court may, in the exercise of its discretion, grant a motion for an extension of time within which to effect service for good cause shown, or in the interest of justice (*Bank v Estate of Robinson*, 144 AD3d 1084, 1085 [2d Dept 2016]). Good cause requires a showing of reasonable diligence in attempting to effect service (see *Bumpus v New York City Tr. Auth.*, 66 AD3d 26, 31-32 [2d Dept 2009]), while the broader “interest of justice” ground allows the court to balance a number of relevant factors in reaching its

determination (*see Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 105-106 [2001]). Specifically, the interest of justice standard requires judicial analysis of the factual setting of the case and a balancing of the competing interests presented by the parties (*Id.*). As distinguished from an extension request premised upon good cause, a plaintiff need not establish reasonably diligent efforts at service as a threshold matter (*Id.*). Rather, a court may consider other relevant factors, including, *inter alia*, the promptness of a plaintiff's request for the extension of time and prejudice to defendant (*Id.*).

Under both standards, an extension of time is warranted. Plaintiff has demonstrated that he has been reasonably diligent in his attempts to serve process on the defendant. Plaintiff hired a process server to personally serve the defendant during the 30-day period immediately following entry of the October 2021 order. In the affidavit of service, the process server, Mr. Mata, states that the defendant's place of abode is a gated property, and he purports to have gone to the residence on five different days. Mr. Mata indicates that bad weather prevented surveillance of the premises on November 18th and 19th, and, on November 22nd, he reports observing no movement at the premises during an hour of surveillance between 5 p.m. and 6 p.m. Mr. Mata also reports observing no movement during another period of surveillance, on November 29th, around the same time of day (5:15 p.m. - 6:14 p.m.). However, he indicates that the gate was open with a car in the driveway on November 29th. Mr. Mata further reports that he knocked on the door on November 29th, but there was no answer. He also reports that there was no movement or lights, and he avers that the gate remained open while he was there. On

December 1st, Mr. Mata indicates that he visited the residence at two different times of day (at 9:38 a.m. and 2:50 p.m.) but on this occasion, he reports that there was no access through the gate and no answer. Finally, Mr. Mata states that he affixed a copy of the initiatory papers on the door of the premises when he attempted to serve the defendant again, on December 6th at 4:06 p.m. Mr. Mata indicates that he mailed the documents via United States Postal Service to the defendant's residence on December 8<sup>th</sup>.

Notwithstanding the fact that plaintiff offered no information regarding the different searches he may have undertaken, the results of any conversations with others regarding the defendant's whereabouts, his diplomatic, or military status, the court finds that the plaintiff has shown sufficient diligence to warrant a second extension of time to effect service upon the defendant.

Additionally, there is no showing of prejudice to the defendant, and a review of the record reveals that the defendant has known about this proceeding, as evinced by Mr. Huebner notice of appearance dated July 7, 2019 (*see Dhuler v. ELRAC, INC*, 118 A.D.3d 937, 939 [2d Dept. 2014][a party may enjoy a second extension of time to serve if the defendant has knowledge of the action and no prejudice exists]).

The parties' remaining arguments are without merit.

Accordingly, it is hereby

ORDERED, that plaintiff's motion (Motion Seq. 4) to extend the time to effect service upon the defendant is granted, and it is further

ORDERED, that plaintiff shall effect service within 60 (sixty) days from the date of this order with notice of entry.

This constitutes the decision and order of the court.

ENTER,



---

HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**